April 19, 2005

Noteworthy:
Senator Orrin Hatch: Kennedy's View of Senate Filibusters Mangles Tradition; *Roll Call*, 4/19/05

DEMS' SUICIDE PLOT; By JOHN PODHORETZ , *NY Post*

Transcript:
MSNBC – IMUS – Interview with Sen. Santorum on Judicial Nominees

Myth vs. Fact

Myth: The Senate has confirmed an overwhelming percentage of President Bush's judicial nominees; therefore it is not problematic that a Democratic minority has blocked 10 nominations from receiving a floor vote.

Fact: President Bush has the lowest first-term appellate confirmation record of any modern President.

While Democrats claim they have confirmed more than 200 of President Bush's judicial nominees, 10 of the 52 nominees to the circuit court of appeals were filibustered. (Jesse J. Holland, "Senate Confirms First Judge Of Bush's Second Term," *The Associated Press*, 4/11/05)

President Bush's confirmation rate for appellate judges is the "lowest" of any modern president. "A better figure would compare Bush's four-year appellate confirmation rate to recent presidents. According to the American Enterprise Institute's John Lott Jr., Bush's four-year rate was 69 percent, the lowest of any modern president. Bill Clinton's rate was 74 percent." (David Reinhard, Op-Ed, "Judge Not Lest Ye Be … Filibuster," *The Oregonian*, 3/17/05)

Kennedy's View of Senate Filibusters Mangles Tradition

By **Sen. Orrin Hatch**
Special to Roll Call

April 19, 2005

My late colleague Sen. Daniel Patrick Moynihan (D-N.Y.) once said that you are entitled to your opinion but not to your own set of facts. But his admonition has not prevented some who are trying to make the filibuster standard confirmation procedure from inventing their own version of Senate and constitutional history.

In his April 6 column in these pages, Sen. Edward Kennedy (D-Mass.) warned against action that would "explode 200 years of Senate practice." But he's two years too late. Two centuries of Senate practice exploded in 2003 when Senate Democrats began using the filibuster against majority-supported judicial nominations.

The Senate keeps track of our legislative and executive business on separate calendars and handles them in separate sessions. While the filibuster had been an accepted part of the legislative process, it had not been used to defeat judicial nominations on the executive calendar.

Instead, for 215 years, Senate practice was to give judicial nominations reaching the Senate floor a final confirmation decision. All four Clinton judicial nominees on whom we took a cloture vote, for example, were confirmed. And, as in the cases of controversial appeals court nominees Marsha Berzon and Richard Paez, those cloture votes were deliberately held to prevent a filibuster and to guarantee what filibusters are now denying to President Bush's nominees: an up or down vote. The explosion of traditional Senate practice has already occurred, with Sen. Kennedy and his party lighting the fuse.

Sen. Kennedy seems to have changed his position. On Feb. 20, 1975, he insisted that "the majority has rights, too," arguing that after "reasonable debate" is over, the minority should not be able to use the "shelter" of the filibuster. Calling for filibuster reform, he argued that "too often, extended debate has become a euphemism for obstruction." The Senate, he said, should operate "under the principle of majority rule, except as the Constitution otherwise provides." The Constitution does not so provide for judicial confirmations, meaning that the 1975 Kennedy standard would prohibit the current judicial nomination filibusters.

Just a decade ago, Sen. Kennedy went even further, voting against tabling an amendment to the cloture rule that would have ended even the legislative filibusters that have so long been part of Senate tradition. Contending that judicial nomination filibusters that had never been part of that tradition are now the very marrow in the Senate's bones is a bit hard to swallow.

Sen. Kennedy now claims that returning to Senate tradition would be a "flagrant abuse of power." Methinks he doth protest too much. One approach to solving this judicial nomination filibuster crisis would utilize a parliamentary ruling to change Senate procedure without formally changing Senate rules.

It might properly be called the "Byrd option" because Sen. Robert Byrd (D-W.Va.), when he was Majority Leader, used it several times. In 1977, for example, he obtained a parliamentary ruling prohibiting certain kinds of amendments after debate on a bill had been limited. In 1979, he obtained a parliamentary ruling that, despite the plain language of Senate Rule 16, took away from the Senate the decision on whether amendments to appropriations bills are germane. In 1980, he challenged a parliamentary ruling against making non-debatable motions to proceed to a specific nomination on the executive

calendar. And in 1987, he obtained a parliamentary ruling changing voting procedures under Senate Rule 12.

In each case, by majority vote, the Senate exercised its constitutional authority to determine its rules and procedures by endorsing Sen. Byrd's position. And in the 1977 and 1980 examples, the Byrd option limited Senators' right to speak.

Look it up: It's all in the public record. What is not in the public record is any protest by Sen. Kennedy that his own party's leader was abusing power, exploding Senate practice, or violating the rule of law. The one thing that has changed right along with Sen. Kennedy's position on the filibuster is the party controlling the White House.

There is one thing on which it appears we can all agree. Sen. Kennedy wrote on April 6 that "the Constitution specifically gave the Senate the power to make its own rules." Whether by utilizing the Byrd option to change Senate procedure or by formal amendment to Senate rules, we have done just that when the minority's right to debate has inappropriately undermined the majority's right to decide. For more than two years, Democrats have rejected the Senate's tradition of refusing to use the legislative filibuster against judicial nominations. If an acceptable compromise cannot be found, and found soon, the Senate must exercise its authority and restore that tradition.

Sen. Orrin Hatch (R-Utah) is a member of the Judiciary Committee and previously served as chairman of the committee.

DEMS' SUICIDE PLOT

By JOHN PODHORETZ , *NY Post*

DEMOCRATS in Washington may be on the verge of making a calamitous political error. What's more, they have every reason to know it — because they saw Washington's Republicans make the same terrible mistake a decade ago.

But because they are so convinced they are in the right — and because they live in an ideological bubble that deafens them in the same way that another bubble deafened House Republicans to the political consequences of their actions on Terri Schiavo — Washington's Democrats are going to go ahead and do themselves serious injury anyway.

Sometime in the coming month, Republicans in the Senate will force through a change in a Senate rule to allow candidates for judgeships to be confirmed by a simple majority vote of all 100 senators.

Votes are now being held up indefinitely via a long-established loophole, the filibuster.

For the past two years, Democrats in the Senate have used the filibuster in a new and highly controversial manner — to *block* consideration of appeals-court and district court nominees who would otherwise be confirmed by the full Senate. (Yes, past judicial nominees by both Republican and Democratic presidents have been held up in the Senate. But those were due to "holds," a different and even more dubious Senate maneuver by which a senator anonymously threatens to consider a filibuster.)

The Republican plan is being called "the nuclear option," ostensibly because it will break with 46 years of tradition and alter a rule that's been in place in the Senate since 1949. But there's nothing really "nuclear" about the rule change itself, or the spate of new judges who will be confirmed in its aftermath. The only "nuclear" explosion that will occur is the response Democrats are vowing to unleash in response.

Democrats say unambiguously that they will gum up the Senate works in response. They will make it impossible for Republicans to take up legislation, to pass bills, to do much of anything.

Minority Leader Harry Reid put it very frankly back in December: "If they, for whatever reason, decide to do this, it's not only wrong, they will rue the day they did it, because we will do whatever we can do to strike back. I know procedures around here. And I know that there will still be Senate business conducted. But I will, for lack of a better word, screw things up."

This threat is just about the only card Democrats have to play against the Republican action.

But if they actually follow through, they'll do themselves and their party great injury. Even though obstructionism is a vital weapon in a party's arsenal, it only works when it goes on below the radar.

The American people don't like it when politicians *announce* that they're going to see to it that nothing happens. Voters don't elect senators to do nothing.

Republicans learned this lesson to their sorrow in the fall of 1995. They went into confrontation mode with President Bill Clinton by sending him budget bills they knew he wouldn't sign. When he vetoed the bills, the federal government was forced to shut down.

The GOP hoped the public would blame Clinton, since he had vetoed the bills. House Speaker Newt Gingrich said, "We want the country to understand that the only way the government will close tomorrow is that President Clinton is determined to close it." That's not the way it went down. Because the GOP had provoked the showdown, *it* got blamed for the shutdown.

The entire business was a political calamity for Republicans. They appeared to be acting out of pique, keeping the government closed in order to force Clinton to bow to their wishes. And Clinton went after them for it, constantly saying he wanted the government to go back to work to serve the American people.

If Reid's Democrats effectively shut down the Senate, they will open themselves up to the same criticism that the GOP received back in 1995. They too will be crosswise of a president — in this case, George W. Bush, who will be able to play the same "get back to work" card that Clinton played.

The Republican argument on behalf of the rules change is far simpler and easier to understand than the Democratic argument. Bush and the GOP will say all they've done is to allow a candidate a fair, up-or-down vote instead of all this fancy footwork designed to delay that vote indefinitely.

So go ahead, Harry Reid. Make George W. Bush's day. If Democrats go into an active and public stance of truculent obstruction, they will hand Bush a giant stick to beat them with when 33 senators — including 6 very vulnerable Democrats — face the voters in their states in 2006.

MSNBC – IMUS – Interview with Sen. Santorum on Judicial Nominees

MSNBC 04/19/05 07:33:22:

DON IMUS: so what's new with you?

SENATOR RICK SANTORUM: we're working on a bunch of things right now. the issue of judge, we're trying to unlock a gridlock that was started two years ago by your good friend, Tom Daschle, who decided that after 214 years, we were going to change the way we confirm judges in the senate. So we're trying to work our way through that, see if we can sort of get back to the way we've doing things around here.

IMUS: what is it, you want to get rid of the filibuster thing?

SEN. SANTORUM: if you read the filibuster rule, it talks about the filibuster being allowed on legislative business. Well, we have two calendars in the senate, a legislative and executive calendar. The executive calendar is an executive se completely different thing, and that's where we can do nominations. For 214 years, no one has ever used a filibuster to block a nominee from coming to a vote on the United States Senate floor until two years ago. And we don't think that's right, and we think that –

IMUS: so you want to change the rules so you can ram through these –

SEN. SANTORUM: We want to go back to the precedent that has held for 214 years and has served this country, I think, pretty well.

IMUS: but it hasn't been a rule for 214 years. It just was never employed. .

SEN. SANTORUM: well, it was a –

IMUS: don't –

SEN. SANTORUM: It was a precedent of the senate. Senate is run by a lot of things, one of them is precedent, and that's how we've done things for 214 years, and the democrats, last time around, changed the precedent. And we're trying to get it back.

SEN. SANTORUM: but not the rule.

SEN. SANTORUM: We're not going to change the rule either. The way it would work is not a rule change, but simply a ruling by the chair that the precedent has been this and we are going to return to that. So it won't be a rules change.

IMUS: I think you know that I don't feel well, and so he's tricking me.

SEN. SANTORUM: I'm just trying to fill your head. I'm trying to cloud your mind.

IMUS: don't you think he's tricking me, Charles?

CHARLES MCCORD: we have almost a semantics problem here.

IMUS: it sounds like you guys are trying to do something that we're not all going to like. I forgot what it was.

SEN. SANTORUM: trust me, you agree with me on a lot more stuff than you think.

IMUS: I agree with you about nothing.

SEN. SANTORUM: that's not true.

IMUS: but you're a good man, I think.

SEN. SANTORUM: thank you, I think.